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No. 01-729

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

GLENN G. GODFREY AND BRUCE M. BOTELHO,
Petitioners,
v.
JOHN DOE I, ET AL., Respondents,

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

AMICUS CURIAE BRIEF SUPPORTING RESPONDENTS IN EVIDENCE THAT INTERNET SEX OFFENDER REGISTRATION IS EXCESSIVE PUNISHMENT THAT STATISTICALLY REDUCES PUBLIC SAFETY

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July 31, 2002

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July 31, 2002

Pursuant to Supreme Court Rule 37(3)(a), it is disclosed that consent was not granted by the parties to file this *amicus curiae* brief. permission was refused by John G. Roberts, Jr.

IN THE
SUPREME COURT OF THE UNITED STATES

Glenn G. Godrey and Bruce M. Botelho, Petitioners, v. John Doe I, et al., Respondents,	MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF No. 01-729

Amicus curiae, Richard Jones, having requested consent from the parties to this action to file this brief, and one of the parties having refused to give such permission, the *amicus curiae* hereby respectfully moves this Court for leave to file an *amicus curiae* brief pursuant to Supreme Court Rule 37(3)(b).

This motion is made as one document with the brief sought to be filed, and is submitted within the time allowed for filing an *amicus curiae* brief in this matter.

The nature of *amicus curiae*, Richard Jones', interest in offering the within brief is to present relevant statistical proof and argument to this Court that is not found in any Federal Circuit Court of Appeals publication of cases relating to sex offender registration to date, and is more fully set forth beginning on page 1 of the within brief with the section entitled, **INTEREST OF THE AMICUS CURIAE**, pursuant to Supreme Court Rule 37(5).

Dated this 31 day of July, 2002.

QUESTIONS PRESENTED

1. Whether fallacious premises that are proven inaccurate by statistical facts should be deemed legitimate justification for enacting legislation that decreases public safety and violates the Constitutional prohibition on Ex Post Facto laws?
2. Whether sex offender registration records that are kept confidential by law enforcement agencies in the performance of their duty, produce greater public safety than sex offender registration records that are made public?
3. Whether procedures that are excessive, based in fallacious statements that become adopted by a legislature, or are grounded in myth, should be implemented?
4. Will more of the total sexual abuse crimes be reported if victims of family members, intimates, or acquaintances know that the perpetrator will (a) lose their job? (b) receive treatment? (c) Go to jail? (d) have their name, photo, and address disclosed to the public on the Internet?
5. Whether public disclosure of sex offender registration information diminishes public safety below that of what occurs from confidential disclosure of the information to police agencies?
6. Is public safety reduced when per capita reporting of sexual abuse decreases?
7. Does an irrational application of onerous sex offender registration procedures which undermines public safety, make the effect of the law so punitive as to violate the Ex Post Facto prohibition and Double Jeopardy clause of the Constitution?

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INTEREST OF THE AMICUS CURIAE

Interest is in presenting relevant statistical proof and argument to this Court that is not found in Federal Circuit Court of Appeals publications to date relating to sex offender registration[1]. Statistical proof begins with research on sex offender recidivism (*Hanson, R. K., & Bussiere, M. T., (1998)*) that was presented by Dr. Hanson at a seminar at the Utah Bar Association in June, 1999. An article summarized the statistical significance of Dr. Hanson's work, and encouraged sex offenders to seek treatment in order to lower their risk to re-offend (*Jones, R. W. (1999)*). The important point proven by Dr. Hanson's statistical research is that the mere identification of sex offenders is correlated with a minimum of at least 60% of them never re-offending in a lifetime. Offenders hidden in the community are perpetrating the vast majority of sexual offenses. A concept used by Washington state, can vastly reduce victimization from sexual abuse by encouraging victims, and families that otherwise may not report, to come forward on condition that the offender will receive community supervised treatment and the family will not be punished by losing a breadwinner[2]. Clinical studies and interview polls show that most victims have an aversion to reporting sexual abuse, based in social and family pressure, as well as a tendency to want treatment more than punishment for the perpetrator.

Sex offender registration methods in Utah evolved from confidential information available only to law

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[1] Contributors other than the *amicus curiae* to preparation or submission of this brief: Larry Hillman $100. Mark Drabner donated time and effort in printing this brief. All of the donors reside in Salt Lake County, Utah. Two counsel of parties in this matter have been contacted: Verne Rupright, counsel for Jon Doe II, and indirectly with John G. Roberts, Jr., counsel for Glen G. Godfrey, et al, who informed that "the state is not going to consent to [t]his filing of an *amicus* brief".

[2] A model is employed in Washington State. The model is analyzed for effectiveness, and recommended. *Berliner, L., Schram, D., et al., (1995)*

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enforcement, to public disclosure. *Amicus curiae* Jones observed the aversive impact of public disclosure on his wife, children, and several friends in his support group. One close friend committed suicide. Vince may have done so because of the commitment that he shared that he was more likely to jump out of an airplane without a parachute than to re-offend. Vince's rip chord was a chain wrapped around his neck (August, 2001). *Amicus curiae* realized that onerous sex offender registration methods not only contribute to lower reporting of sexual abuse by families and friends, but also contribute to negative risk factors, including the inability to remain employed[3]. Internet public disclosure and other onerous sex offender registration laws are unconstitutional because they are not rationally connected to the good purpose of public safety (*Kennedy v. Mendoza-Martinez (1963)*), actually reduce public safety by deterring families and victims from reporting, and by increasing risk factors.

When reviewing the requirement in Rule 37(5) for the *amicus curiae* to set out their interest, we wondered if it was relevant as long as the brief contains factual information that will help this Court. After considerable pain in relating *amicus curiae* Jones' interest, we recognize high relevancy. Jones is a convicted and rehabilitated sex offender who very much wants to help end cycles of abuse in our society. He believes it is his duty is help because of his experiences. Interest comes from that duty, and because of insights that *amicus curiae* have. One thing that has made our Nation great is that privacy interests have been parallel to government interests. Here is an example of where assumption, that there is a great disparity between government and private interests, has resulted in onerous legislation that is irrationally connected to public safety.

[3] *Quinsey, V.L., et al (1995)* "report... the most important need at present is the identification and evaluation of dynamic predictors,... as situational predictors [including such things as gaining or losing employment]"

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This has resulted in punitive violation of Double Jeopardy and the prohibition on Ex Post Facto Laws. Only this Court can stop the violations by upholding constitutional protections against an oppressive majority motivated by fear and myths that do not apply to most sex offenders.

SUMMARY OF THE PROOF AND ARGUMENT

Sex offender registration laws have historically been enacted to promote the non-punitive purpose of public safety. The original statutes often contain an unambiguous statement of this "good governmental purpose", which seldom, if ever, changes in subsequent amendments to the original version of the law. While the alternative purpose for such amendments has not changed, many amendments to sex offender registry laws have added increasingly onerous methods that exceed the basic confidentiality in identification provisions of the original statute, and may change the purpose.

Lawmakers have assumed that identification of sex offenders may lead to better public safety by "perhaps... deterring them and others from perpetrating sex crimes" (*Femedeer v Haun (2000)*, 227 F.3d 1244 (10th Cir)), and, according to Utah's sex offender registry law, by aiding investigation and apprehension (*UCA 77-27-21.5(2)*) [unchanged in all amendments]. Scientific Research has been conducted to test these assumptions, and now clearly proves that while the basic confidentiality in identification provisions of original statutes, strongly serves public safety (*Hanson, R. K., & Bussiere, M. T., (1998)*), onerous methods that exceed confidentiality, result in reduced public safety and a lower percentage of sexual abuse reporting.

> "The criminal justice response to convicted sex offenders has been marked by uncertainty about how to achieve desired societal goals, whether it involves punishing criminals or preventing reoffenses... there is widespread belief that **punishment as a sole sanction deters certain**

victims from reporting and cooperating with criminal prosecution, especially where the offender is known or is a relative to the victim. In cases of incest there may be negative consequences to the victim if the offender is incarcerated and the family loses the economic support". (*Berliner, L., Schram, D., et al., (1995), pg 487 & 488*)

"Reporting of sexual abuse increased significantly in the late 1980s and the early 1990s. **In recent years**, however, **there has been a substantial decline in reports to child abuse authorities** (Jones & Finkelhor (2001). **A majority of states have seen decreases of up to 30% since 1994**". (*Berliner, L., & Elliott, D. (2002)*)[4].

The connection is analyzed between the public safety and excessive methods in sex offender registration statutes that do not take into account risk assessment or the negative impact of onerous procedures. Three of the factors assessing

[4] (Jones & Finkelhor, (2001)). "A majority of states have seen decreases of up to 30% since 1994. The reasons for this change are unclear..." (Berliner, L., & Elliott, D. (2002). Herein we respectfully submit that the reasons for the decline of reporting of sexual abuse are not unclear at all. Statistical proof presented here shows that up to 97% of all sexual abuse goes unreported. Calculations of actual reporting in the past have been as low as one in 153 victims. If the amount of abuse is exponentially greater than the small amount of reporting, then what public safety connected phenomenon has come into play in recent years that could reduce the already small amount of reporting by another 30%? Deductive logic yields the clearest answer when one frames the scientific and historical facts into premises. The majority of Victims and families are reluctant to report sexual abuse that has been perpetrated by someone that they know, unless they believe that the perpetrator will receive help in treatment, and not be unduly punished. Most sexual abuse is perpetrated by someone that the victim knows. Onerous sex offender registration methods are viewed as unduly punishing sex offenders. Therefore, victims and families are more reluctant to report sexual abuse than they were prior to the time that onerous sex offender registration methods began to be used. Excessive sex offender registration methods have a high deterrent effect upon reporting of sexual abuse, thereby diminishing public safety, and propelling the cycle of abuse into future generations.

whether a statute is so punitive in effect that it violates the prohibition on Ex Post Facto laws (*Kenneúy v. Mendoza-Martinez (1963)*), are re-visited in light of statistical proof. Alaska's sex offender statute and the amendment history of Utah's original 1987 sex offender registration law, are placed in context to show that despite their besf intentions, both the Federal 10th Circuit Court of Appeals and the Federal District Court for Utah, incorrectly believed that public safety is served by onerous sex offender registration methods (*Femedeer v Haun (1999)* 35 F. Supp.2d) (*Femedeer v Haun (2000)*, 227 F.3d 1244 (10th Cir)).

Applying the scientific proof to the 3 *Mendoza-Martinez* factors conclusively shows that: (1) sex offender registration laws that include Internet disclosure and other onerous methods, violate Ex Post Facto prohibition and the Double Jeopardy clause. (2) Onerous sex offender registration methods deter reporting of sexual abuse, and thereby reduce public safety, apprehension, and the effectiveness of investigation.

It is asserted that many more victims and family members will come forward to report sexual abuse if they believe that the offender will receive treatment and the family members and perpetrator will not be arbitrarily punished with procedures implemented after the report, or once treatment is completed. Many more victims may come forward if offenders who are bread winners are afforded supervised work release while they take treatment, and have their sex offender registration information kept confidential and available only to police. Many more victims will undoubtedly come forward to report if this Court affirms that ex post facto and Double Jeopardy provisions are violated when state laws are implemented that impose changes to sex offender registration requirements, statutes of limitations, and expungement provisions, that did not exist at the time the offense occurred. Until the above measures are taken to

encourage victims to come forward with reports on sexual abuse, the **vast majority of sexual abuse** will continue to **go unreported**[5], and public safety will not be rationally connected to sex offender registration and other laws. Such laws stand as excessive, because of their negative impact on reporting of sexual abuse. Until the negative impact on reporting (and public safety) is reversed, the *Mendoza-Martinez* factors of Excessiveness and Irrational Connection to Alternative Purpose will weigh for Punishment and Violation of Ex Post Facto and Double Jeopardy.

We respectfully conclude and pray that this Court Order that sex offender registration laws, and amendments to statutes, that require less confidentiality and/or more frequent or longer registration than the statue(s) previously in effect, violate Double Jeopardy and ex post facto provisions, and do not apply to convictions which occurred prior to their respective enactment dates.

We also urge and pray that this Court Declare all statutes that require public disclosure of sex offender registration information on the Internet, to be contrary to the legitimate government purpose of public safety, and Remand all statutes permitting public disclosure (except for non-Internet tier 3 disclosure regarding high risk offenders as per the current New Jersey sex offender registration statute) back to the various states for implementation of sex offender intervention measures that promote public safety by encouraging victims to report sexual abuse, and perpetrators to identify themselves and seek treatment.

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[5] "only 16 percent of rapes are reported to law enforcement" (Rape in America: A Report to the Nation (1992), The National Victim Center, and the Crime Victims Research and Treatment Center), "One in three girls and one on five boys will be sexually abused by age 18" (Salt Lake Office of Guardian Ad Litem (1998)), "78% of teenage sexual assault victims do not tell their parents about the incident" (Robin Warshaw (1988), I Never Called it Rape).

ARGUMENT BASED ON SCIENTIFIC FACTS

I. IDENTIFICATION OF SEX OFFENDERS SUBSTANTIALLY REDUCES RECIDIVISM RATES OF THE SEX OFFENDERS IDENTIFIED.

Identification of sex offenders drastically reduces their risk to re-offend, and leads to treatment, which further dramatically reduces the risk to re-offend. Statistical proof shows that 60% of sex offenders that become identified never re-offend in a lifetime, regardless of whether or not disposition of their case results in incarceration (*Hanson, R. K., & Bussiere, M. T., (1998)*) (*Jones, R. W. (1999)*) As treatment has become more common for sex offenders, the percentage that do not re-offend has increased. In a recent statistical study, the average sexual recidivism rate was 18% after 5 years, 22% after 10 years, 26% after 15 years, about 35% after 23 years, after which no further re-offenses occur (*Hanson, R. K., & Thornton, D. (2000)*). More recent statistical proof shows that up to 70% of sex offenders that become identified never re-offend in a lifetime[6]. The recent results showing that more sex offenders do not re-offend, are consistent with the fact that the older studies include a higher percent of samples where treatment had not been completed. Clearly this statistical proof dispels "the myth that once a sex offender, always a sex offender" (*Jones, R. W. (1999)*), and logically leads to the conclusion at the heading of this section, that "identification of sex offenders substantially reduces recidivism rates of the sex offenders identified".

A graph summarizing the recidivism base rate that is statistically shown by Dr. Hanson, was provided by him at the June 1999 Utah Bar Association seminar, where Dr.

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[6] "Current treatments...reductions in ...sexual recidivism (from 17.4 to 9.9%)", and that those who complete treatment have lower recidivism rates than those who do not (*Hanson, R. K. et al. (2002)*).

Hanson gave *amicus curiae* permission to reproduce it. The **graph is reproduced in the appendix on the last page** of this brief. A recent summary by Dr. Hanson of the statistical proofs shown in the appendix graph states:

> "it is useful to consider the expected recidivism rate for the average sex offender-the recidivism base rate. Contrary to common opinion, the observed recidivism rate of sexual offenders is relatively low… only 13.4% committed a new sexual offense within 4 to 5 years (Hansen & Bussiere, 1998)… we know that the observed recidivism rates for sexual offenses can increase to 30 to 40% as the follow-up period extends over 20 years… even with long follow-up periods and thorough searches, studies rarely find sex-offense recidivism rates greater than 40%. Any recidivism is troubling, but the available evidence does not support the popular belief that sexual offenders inevitably reoffend." (*Hanson, R. K. (2000)*)

However, the **vast majority of sexual crimes go unreported** (*Small, J.A. (1999)*)[7]. This huge number of unreported sexual assaults is perpetrated by offenders who remain undetected in the community while creating more and more victims. One study found that only 2% of victims of incest report sexual abuse, and only 6% of victims of non

[7] The following is found in *Small, J.A. (1999)* "statistics indicate that one in five children will be the victim of a sexual offense before the age of eighteen"…25% of adolescent girls and 12% of high school boys reported that they had been sexually or physically abused (Tamar Lewin) Sexual Abuse tied to 1 in 4 Girls in Teens, N.Y. Times, Oct 1 1997 at A24 (citing Commonwealth Fund study and Alan Guttmacher Institute study)" Freeman-Longo, The Sex Offender [states]…one in four girls and one in six boys will be victimized before age 18. See Lawrence A. Greenfeld, Bureau of Justice Statistics. In 1995, there was one violent sex offense reported for each 625 United States citizens (Greenfeld). Note that 1 per 625 reported and 1 per 4 occurred means only .64% of all abuse becomes reported. That is the same as 1 sex offense report per 153 cases of sexual abuse (excluding multiple events).

family members, report (*Russell, D. E. H. (1986)*). With the higher percentage of sexual abuse occurring within families, the average may be 3% of victims that report[8]. Therefore, when investigating new cases of sexual abuse, **it is the unidentified offender population that is creating the vast majority of new sexual offenses**, and investigation of sex offenders who have previously been identified does little to help apprehend unidentified offenders.

The hypothesis that excessive public disclosure of sex offender registration information, and more frequent and extended registration periods, may assist with apprehension of new perpetrators and investigation of sexual abuse cases, may have played a part in a national proliferation of amendments to sex offender registration laws *Small, J.A. (1999)* [9]. Such amendments include substitution of confidentiality requirements for public Internet disclosure[10].

[8] Adult women were questioned if they had been sexually abused at any time in their lives. Less than 42% who responded to the poll had told a close friend or relative within one year, 21% told someone after one year had passed, while only 3% had reported to authorities. 36% of those who had been sexually abused, disclosed that they had never told anyone until questioned in the poll (*Los Angeles Times poll (July 1998)*). Calculating from the Times poll, for every 3 victims that report to police, there are another 97 victims who do not, 36 of which virtually never tell anyone. Friends who hear about the abuse do not report to police, except where the report is counted among the 3% reported.

[9] *Small, J.A. (1999)* pg 1452 "Reacting to public outrage and fear… legislatures hurried to craft far-reaching laws targeting all sex offenders…these hastily enacted statutes are fraught with significant problems… onerous provisions applicable to thousands of Americans…" These laws reach innocent members of the sex offenders family. Pg 1456 "A frequently raised argument in favor of SORAs is that sex offenders have high recidivism rates…it is important to realize that sex offenders in general are not more likely than other criminals to reoffend (Scheingold et al, supra note 14, at 812)… 'data do not suggest that sexually violent crimes are increasing at a rate faster than other types of crime'"

[10] *Small, J.A. (1999)* pg 1462 & 3 "The type of protection offered by this service [CD ROM database of registered sex offenders available to the

II. ALL WHO QUALIFY FOR EX POST FACTO RELIEF ARE LOW RISK, AND RE-OFFENSES ARE SUBJECT TO NEW STATUTES ANYWAY. THE CLEAREST STATISTICAL PROOF SHOWS THAT SEX OFFENDERS WHO HAVE NOT RE-OFFENDED WITHIN 6 YEARS OF RELEASE TO THE COMMUNITY, HAVE VERY LOW RECIDIVISM RATES AND AFTER 23 YEARS WILL NEVER RE-OFFEND DURING THEIR LIFETIMES.

In the foregoing section I of this brief, the **clearest statistical proof** is presented that shows that a minimum of 60% of sex offenders never re-offend in a lifetime, from the point that they are identified (*Hanson, R. K., & Bussiere, M. T., (1998)*). More recent studies using increasingly larger sample sizes show proof that the percentage of identified sex offenders that never re-offend is on the increase (approaching 70%), (*Hanson, R. K., & Thornton, D. (2000)*). The improvement in recidivism rates of the recent research may be due to increased availability of therapy to identified sex offenders. Completion of treatment has independently been shown to significantly reduce recidivism (*Hanson, R. K. et al, (2002)*). Therefore, the earlier studies that show only 60% of identified sex offenders never re-offend, will be used here as conservative and **conclusive proof** that a minimum of sixty percent of all identified sex offenders pose no risk to society. It may be difficult to determine which members of the

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public] is questionable; although it does provide information to the community, it seems to be geared more toward sensationalism than a reasoned use of information" which is clearly irrationally connected to public safety. pg 1465 "lists can contain persons convicted for conduct that has been decriminalized"... who committed crimes so long ago that they can no longer be considered a threat" Also note that Hanson's statistics show 0% threat or risk after 23 years. In this context, lifetime registration makes no sense for public safety and is punitive when no public safety concern exists. A 5 year registration period is long enough for most risk categories (see Hanson)

identified group are among the 60% who will not re-offend at the point of their release to the community. However, the time that has passed since release to the community of those who qualify for ex post facto & Double Jeopardy relief from new laws and amendments regarding sex offender registry, places them in low risk or no risk categories. Most of the sex offenders who were convicted and released before the 1994 Alaska sex offender statute was enacted, remain free with little or no risk to re-offend. Those among that group who have re-offended are now subject to the new laws, and are no longer eligible for Ex Post Facto consideration anyway.

A close look at the graph found in the Appendix on the last page of this brief, shows three striking statistical scientific facts that cannot be refuted.

1. After thousands of sex offenders have been tracked for over 23 years (*Hanson, R. K., & Bussiere, M. T., (1998)*) (*Hanson, R. K., & Thornton, D. (2000)*) there are absolutely no offenders left in the group who will re-offend among those who have not re-offended by that time. After the 23 year point, all remaining offenders in the group pose no risk to the community. The absolute flattening of the curve on the graph scientifically proves that the myth that "once a sex offender, always a sex offender" is a fallacy (*Jones, R. W. (1999)*). Although it is impossible to subjectively separate the 60% who will not re-offend from the 40% who will at the point of release to the community, after 23 years those that remain in the community will never re-offend, and likely were low risk from the first day of their release to the community two decades earlier.
2. After 6 years the graph shows that more than 13 out of every 40 who will re-offend, has already been re-arrested and made subject to newly enacted laws.
3. The graph **conclusively proves** that in the instant case, John Doe I, and John Doe II, who plead nolo contendere in 1984 and 1985, and were released in 1990, represent little or no risk to the community regardless of Ex

Post Facto and Double Jeopardy considerations. John Doe I has been determined by a court to "have been successfully rehabilitated"... based in part on "psychiatric evaluations concluding that Doe I has 'a very low risk of re-offending' and is 'not a pedophile'" John Doe II completed a sex offender treatment program (*Doe I v. Otte (2001)*). This constitutes the **clearest proof** that any sanction placed upon them by the State that goes beyond 23 years from when they were released to the community, constitutes punishment. Each of them have been released to the community for 17 years at this point in time, and their pleas of nolo contendere occurred two decades ago. Their base line recidivism risk has been significantly reduced by therapy and psychiatric evaluation. The circumstances of the instant case demand that any application of the Alaska sex offender registration statute to them and persons similarly situated, constitutes punishment, because when there is no risk to re-offend, there is no public safety to protect, and enforcement of the law becomes irrational.

This goes to the excessiveness arguments presented later in this brief. All identified sex offenders that have spent time in the community become subject to newly enacted amendments to sex offender registration statutes, and therefore have Ex Post Facto and Double Jeopardy issues based in the **fact that their statistical risk to re-offend diminishes faster than the jurisdiction of new sanctions**. Sanctions like those contained in the Alaska sex offender registration law can not be anything but punitive for the Respondents in the instant case if they represent no statistical risk in the community after 17 years, with treatment. Indeed, the respondents may have represented no risk to the community from the day of their release, but subjective measures could not make that determination 17 years ago.

In following sections of this brief, a more striking element of punishment resulting from excessive sex offender

registration methods is presented to this Court: **Excessive methods** of sex offender registration, **including public disclosure on the Internet, are irrationally connected to the intended government purpose of public safety. There has been statistically as much as 30% less reporting of sexual offenses since the 1994 enactment of the Alaska sex offender registration act**[11].These statistical facts have never

[11] Information found in *Lawrence A. Greenfeld (1997)* "The number **reported** by victims age 12 or older in 1995 declined significantly from 1993: 1993 – 1 violent sex offense for every 435 residents. 1995 – 1 violent sex offense for every 625 residents... in 1995 the number of forcible rapes **reported** to the police nationwide was 97,460, the lowest total since 1989... The highest rate of forcible rape recorded by law enforcement... was in 1992 (84 per 100,000 women)... By 1995 the rate had decreased over 14%" This may be due to new laws and amendments that deter **reporting**. Pg v. "per capita rate of arrest was 50.3 per 100,000 residents in both 1983 and 1995, remaining unchanged even though the rate of reporting went down. Also on pg 8 "The per capita rate of arrest in 1995, 50.3 per 100,000 residents, is the same as the arrest rate in 1983". Note that the per capita arrest rate for sex offenses has been constant at 50.3 per 100,000 residents, although reporting of sex offenses is decreasing. "new questions and revised procedures were phased in from January 1992 through June 1993... Since July 1993, the redesigned methods have been used for the entire national sample... the new questionnaire would produce estimated rates of rape and sexual assault that were about 4 times [400%] higher than previously measured" pg 1. Therefore, statistics prior to 1993 are not comparable. "Victim and offender are likely to have had a prior relationship as family members. Victims of rape and sexual assault report that in nearly 3 out of 4 incidents, the offender was not a stranger" pg iii "sexual assaults reported by victims in the preliminary estimates for 1995 were significantly below the number of such offenses estimated for 1993... offenses experienced by victims is estimated to have dropped by a quarter and the per capita rate of rape and sexual assault to have dropped 30%... 1 rape/sexual assault victimization for every 435 persons...The most common reason given by victims... **for reporting** the crime to the police was to prevent further crimes by the offender against them... **for not reporting** the crime to the police was that it was considered a personal matter." Pg 2 Note that victims tend to report for prevention, not for enforcement. "3 out of 4 [1993 reported] rape/sexual assault victimizations involved offenders...with whom the victim had a prior relationship as a family member, intimate, or acquaintance." Pg 4 "For nearly 90% of the

been brought to the attention of any other court. *Mendoza-Martinez* standards that punishment exists if a statute is not rationally connected to it's alternative purpose, now tip to show violation of Ex Post Facto and Double Jeopardy. Excessiveness standards also are strongly weighted to a conclusion of punishment in the instant case, especially in light of the irrational connection to public safety, and the punishment meted out to the respondents, who pose no further risk to society.

III. EXCESSIVE PROCEDURES, INCLUDING ONEROUS SEX OFFENDER REGISTRATION METHODS, LEAD TO REDUCTION OF REPORTING OF SEXUAL ABUSE, RESULTING IN LESS IDENTIFICATION OF SEX OFFENDERS AND DECREASED PUBLIC SAFETY.

The hypothesis, that onerous procedures may assist public safety, has failed to be born out by statistical research. Research shows that victims become less likely to report sexual abuse as sex offender registration methods and punishment of sexual offenses become more onerous in the view of the victims themselves (*Berliner, L., & Elliott, D. (2002)*)[12]. As sex offender registration methods begin to

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youngest victims of rape, those younger than 12, the offender was someone known to them... family members victimized 43% of these young victims – about 4 times the proportion found among victims age 30 or older (11%)". Pg 4 "Sexual assaulters were about 3 times as likely as all violent offenders and twice as likely as rapists to report that the victim had been a member of their family. For 1 in 4 imprisoned sexual assaulters, the victim had been their own child or stepchild." Pgs 24 & 25.

[12] The following is found in *Berliner, L., & Elliott, D. (2002)* pg 58 "fewer than half of victims tell anyone at the time of the abuse, and a large percentage never reveal the victimization until asked for research purposes (Finkelhor et al., 1990)...only 6% to 12% of cases are reported to authorities (Elliott, 1993; Russell, 1984, Saunders et al., 1999)... Overall, in 45% to 75% of all cases that come to the attention of authorities, the precipitating event is something other than the child's

exceed the legitimate purpose of identifying offenders to police agencies in the line of their duty, the degree of denial of sex abuse increases within families and the community (*Berliner, L., & Elliott, D. (2002)*)[13]. This results in more perpetrators remaining unidentified. Perpetrators who are not identified, do not share the low risk of re-offending that has been proven for identified sex offenders . In fact, unreported perpetrators commit the vast majority of sexual crimes.

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report of abuse (Elliott & Briere , 1995)... Children are thought to recant either because they have been subjected to pressure from the offender or family members or because their report has produced negative consequences for themselves or others. Many children report fears about telling or regret the disclosure because of the outcome (Sauzier, 1989)...Almost all children believe that telling is the right thing to do to stop abuse and to receive help (Berliner & Conte, 1995).

[13] The following is found in *Berliner, L., & Elliott, D. (2002)* Child abuse figures vary by state definitions...Currently, the best mechanism for determining the scope of child sexual abuse is through retrospective surveys of adult non-clinical populations. Such surveys show considerable variability...Finkelhor (1994) ...concluded that at least 20% to 25% of women and from 5% to 15% of men experience contact sexual abuse. Most studies...find similar percentages...impact of trauma on memory suggests that estimates of abuse rates based on self reports of adults may underestimate its prevalence...adults with documented childhood sexual abuse histories found that more than 30% of the respondents did not report those early experiences when questioned (Widom & Morris, 1997; Williams, 1994)". pg 56 The percentages of reported related and unrelated perpetrators were similar but different between clinical studies and general population surveys: "strangers account for a relatively small proportion (5%-15%) with the remainder of cases involving individuals known to the child or family. In clinical samples, parent figures comprised between a quarter and a third of the offenders and all relatives about one half (e.g. Elliot & Briere, 1994; Gomes-Schwartz, Horowitz & Cardarelli, 1990). Based on general population surveys, abuse by parent figures (parent and stepparents) constitutes between 6% and 16% of all cases, and abuse by relative comprises more than one third of cases"]

Public safety is diminished by excessive sex offender registration methods, including disclosure on the Internet. This is consistent with the findings of researchers in the area of why sexual abuse is often not reported. "[I]s it possible that more victims would come forward if they felt the offender would receive treatment rather than incarceration? Does the availability of treatment make it more likely that offenders would confess rather than deny their offenses..." (*Murphy, W.D., & Smith, T.A., (1996)*). "[I]n many cases the actual victims often desire that one result of prosecution will be supervised treatment...This is particularly true when the offender is related or known to the victim or family, which occurs in the majority of cases where children are the victims. A criminal-justice response that does not include treatment opportunities for at least some sex offenders may undermine victim cooperation with prosecution" (*NCMEC (1998)* (pg 2 of 15))[14].

[14] *Berliner, L., (1996)* "some courts ... contend that such laws fail to increase community safety, the ostensible goal of the laws. It is even suggested that community notification might increase risk of reoffense... Fortunately, the state of Washington incorporates evaluation into sex offender legislation and some data are available describing the effects of the law...raise the question of community responsibility with regard to certain criminals...Does making citizens aware of their presence in a formal way make a difference...is it helpful or does it make matters worse?" *Warshaw, R. (1988). Salt Lake Office of Guardian Ad Litem (1998)* "One in three girls [33%] and one in five [20%] boys will be sexually abused by age 18" *National Victim Center and the Crime Victims Research and Treatment Center (1992)* : Rape in America: A Report to the Nation. "only 16% of rapes are reported to law enforcement". *Summit, R. (1983)* Explores the complex position in which the child victim is placed and describes why a child who has revealed sexual abuse may later deny it occurred... where the child has both the power to destroy the family and the responsibility to hold it together; the disclosure, which is often delayed , complicated and unconvincing; and ... a phase of retraction, where the enormous family pressures on the child may lead the child to decide that the only course left is to say that the abuse did not happen after all...Repeated Commentaries on this subject however have called for more creative thinking... and have emphasized the need for a social service response rather than stricter prosecution." (Daro, D., (1994) Prevention programs of childhood sexual abuse." The Future of Children. 4.2 (Summer/Fall), pp. 198-223) (Finkelhor, D. (1990) "New ideas for child sexual abuse prevention." In Oates, R.K. (eds). Understanding and Managing Child Sexual Abuse. Australia: Harcourt Brace Jovanovich Group Pty. Limited, pp 385-396.) (McCall, G. (1993) "Risk factors and sexual assault prevention." Journal of Interpersonal Violence, 8, pp. 277-295)... opportunity for present victims to reach out for help, thereby preventing continued abuse (Leventhal (1987) "Programs to prevent sexual abuse: What outcomes should be measured?" Child Abuse and Neglect 11, ppp. 169-171... children have greater difficulty in accepting the idea that abuse can occur at the hands of someone they know than at the hands of strangers (Finkelhor, D. and Strapko, N. (1992) "Sexual abuse prevention education: A review of evaluation studies." In Willis, D., Holder, E., et al., (eds). Child Abuse Prevention. New York: Wiley. Additional references: Berliner, L., & Conte, J. (1995) "The effects of disclosure and intervention on sexually abused children." Child Abuse and Neglect. 19, 371-384. Browne, A. & Finkelhor, D. (1986) "Impact of Child Sexual Abuse: A Review of the Research" In Donnelly, A.C. & Oates, K. (eds), Classic Papers in Child Abuse, Sage Publications, Thousand Oaks, CA, 2000 pps. 217-282. (Telling or not telling, parental reaction.)

The statistical and clinical research found in these footnotes, unquestionably provides the essential premise to the correlation that the more onerous the sex offender registration methods, the less people are likely to come forward to report sexual abuse. Logical deduction then leads to the conclusion that **public safety is actually diminished as a result of public disclosure of sex offender registration information on the Internet**[15]. In making recommendations

[15] Information found in *Small, J.A. (1999)* pg 1467 - 1469 Citing Doe v. Poritz, 662 A.2d 367, 376 (N.J. 1995) "This Court has no right to assume that the public will be punitive when the Legislature was not, that the public, instead of protecting itself as the laws intended, will attempt to destroy the lives of those subject to the laws...We do not perceive in this case a society clamoring for blood, demanding the names of previously-convicted sex offenders in order to further punish them..." The Law Review continues, "Although the court's opinion put great faith in the public, the years following Poritz have proven the court's assumption wrong. Many released offenders have been threatened or attacked.

for a sex offender policy, the National Center for Missing & Exploited Children recognized that victims base decisions to tell or not to tell upon perceptions related to sentencing [and punishment] practices, and that victim reporting is connected to public safety[16].

Relatives and friends of sex offenders may also be the victims of ostracism and public anger (footnote references Kimball, supra note 36 at 1201 describing ostracism of relatives)...Problems finding and maintaining employment, securing housing, and making and keeping social relationships are inevitable results of the stigma attached to the label 'sex offender,' – regardless of the severity of the crime or the likelihood that the individual will reoffend" pg 1480 & 1491 "It cannot be stressed enough that if the true purpose of notification statutes is community protection, notification should be limited to means which may actually provide protection to the community. Extensive notification such as the posting of photographs and home addresses on the Internet clearly goes beyond this purpose and exposes the individual to substantial burdens...It is unclear how much protection these sites provide ...pose a risk that individuals who get the information from the Internet will take it upon themselves to notify others, thus making notification an even less controlled process by taking it out of the government's hands...Internet notification exceeds the reasonable bounds...because the risk of improper notification and harms faced by the individual are very high."

[16] NCMEC advocates that "Victims should be encouraged to cooperate with the criminal-justice system, and unnecessary system-induced trauma on these victims should be minimized... Research must be a priority, focusing upon what works and what doesn't... Sentencing practices should be primarily focused on community safety. Victim wishes should be heard and considered; however, where they conflict with the community's interests, victim wishes should not be determinative. Treatment alternatives should be backed by suspended prison time... should be based on current research... in reducing recidivism. ...the primary concern is public safety... States should adopt a policy of zero tolerance regarding acts of harassment or vigilante violence directed at offenders. It must be each state's commitment to ensure that community notification regarding released offenders is handled responsibly and properly by citizens of the community" (NCMEC Sex-*Offender Policy Task Force and Endnotes (1998)* A Model State Sex-Offender Policy).

IV. DEDUCTIONS FROM STATISTICAL FACTS PROVE THAT PUBLIC SAFETY IS DIMINISHED BY ONEROUS SEX OFFENDER REGISTRATION METHODS, INCLUDING PUBLIC DISCLOSURE ON THE INTERNET. SUCH METHODS DEFEAT THE GOOD INTENDED ALTERNATIVE PURPOSE, CREATE ADDITIONAL PUNISHEMENT, AND VIOLATE THE PROHIBITION ON EX POST FACTO LAWS AS WELL AS THE DOUBLE JEOPARDY CLAUSE.

Statistical and historical facts are the basis of a simple yet **clear** conclusion that legislative evolution of sex offender registration procedures began with a strong positive correlation between the original procedures and public safety in many states that passed these registry laws in the late 1980s and early 1990s. However, in the instant case, in light of the scientific proof that onerous procedures, that deter victims form reporting sexual abuse, result in diminished public safety, Alaska passed its original 1994 sex offender registry statute with no such rational connection.

As sex offender registration acts (SORAs) **evolved from** strict confidentiality available only to police agencies, **to** public disclosure on the Internet, the earlier "[C]ourts that have addressed these issues almost uniformly have held that SORAs are not punitive" (*Small, J.A. (1999)* pg 1470). However, **no court has ever before considered** the scientific facts presented in this brief, which show that **SORAs which exceed** the legitimate government interest of confidential sex offender identification available only to law enforcement in performance of their duties, **are so irrationally connected** to public **safety that they undermine it**. Irrational connection to the purpose makes the law punitive, which violates the Ex Post Facto prohibition and Double Jeopardy clauses.

Ex Post Facto and Double Jeopardy consideration include the standards of the *Mendoza-Martinez* test for laws

that may be punitive in effect. The sixth of the seven tests being that of re-evaluating whether or not the legislative intent is rationally connected to the methods contained in the law. This brief provides strong evidence, including that there has been a 30% reduction in reporting of sexual abuse in recent years (*Greenfeld, L. A. (1997)*), that for onerous methods like Internet public disclosure, the legislative intent of public safety is not rationally connected to those means. Evidence for irrational connection to the alternative purpose may not have been presented to a court before with respect to sex offender registration laws. Never the less, now it is shown for the first time that the connection between the alternative purpose and the methods is punitive.

From the beginning of the legislative evolution of SORAs, the alternative purpose for sex offender registration statutes has been "public safety". Comparing Alaska and Utah's legislative evolution in instructive[17]. On making this comparison one can readily see that the public safety

[17] Comparison of Alaska and Utah sex offender registration statutes: 1. Internet public access is currently equal between Utah and Alaska's statutes, although Utah began with a rationally connected set of methods with public safety, and Alaska began immediately with irrationally connected means with public safety. 2. Many additional offenses were added to the original Alaska statute with effective date 6-5-99. These additions have analogous ex post facto punishment/retroactive impact to Utah's amendments which removed the guarantee of confidentiality with a series of amendments between April 1, 1992 and 1997, when another amendment to the statute made the information available to the public. The following year (1998) the Utah public information was made available on the Internet in order to save cost to the state in administering requests for information. 3. Utah's sex offender registration law does not require disclosure of an offender's place of employment, as the Alaska statute does. However, substantially all onerous methods are currently the same. The Utah internet public disclosure gives access to sex offender information to the world, including all consumers who are customers at all places of business, and thereby threatens employment of sex offenders virtually just as much as the Alaska Internet disclosure.

alternative purpose is not rationally connected to the Alaska statute, in the instant case (*AS 12.63.010, 12.63.020, 12.63.030, 12.63.100*). The legislative record shows that the 1994 SORA was enacted because, "The legislature finds that (1) sex offenders pose a high risk to reoffending after release from custody; (2) protecting the public from sex offenders is a primary government interest; (3) the privacy interests of persons convicted of sex offenses are less important than the government's interest in public safety; and (4) release of certain information about sex offenders to public agencies and the general public will assist in protecting public safety". 1994 Alaska Sess. Laws 41, sec 1. (*Russell(1997), 124 F.3d(9th Cir) at 1087*). Scientific proof now clearly shows that the premises which the Alaska legislature used to justify it's connection between the Alaska sex offender registry methods and public safety, are either fallacious or irrationally connected to the intended alternative purpose[18]:

1. The contention that "sex offenders pose a high risk to re-offending after release from custody", is fallacious. The scientific proof shows that in general sex offenders have a low recidivism rate compared with other offender types.
2. While, "protecting the public from sex offenders is a primary government interest", this purpose is not rationally connected to the procedures employed by the Alaska statute in the instant case. Scientific proof shows that public disclosure of sex offender registry information does not protect the public from sex offenders, but instead results in less reporting of sexual abuse by victims and thereby puts the public at greater risk from sex offenders who do not become identified. While sex offender registry information available only to police agencies in the performance of their duties may help protect the public from sex offenders, the public

[18] A reasonable legislator motivated solely by the aim of preventing additional sex offenses could not believe that the means chosen by the Department were justified by that aim (Femedeer v. Haun (1999)).

Internet disclosure of sex offender registry information employed in the instant case, results in fewer over all sex offenders becoming identified. (see footnotes at item 4)

3. While, "the privacy interests of persons convicted of sex offenses are less important than the government's interest in public safety", in the case of public disclosure of sex offender registry information, of offenders with little or no risk to re-offend, the privacy interests of the majority of sex offenders and public safety interests, are parallel and consistent. Public safety is served by keeping registry information of low risk offenders confidential by police agencies. (see footnotes at the end of item 4)

4. The contention that, "release of certain information about sex offenders to public agencies and the general public will assist in protecting public safety", is generally fallacious. Release of sex offender registry information to the public has proven to be detrimental to public safety, especially when taken to the extreme on the world wide web as in the instant case (*Berliner, Lucy (2001)*)[19](*Small, J.A. (1999)*)[20].

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[19] Information found in *Berliner, Lucy (2001)* (see also [Henry, J. (1997) System intervention trauma to child abuse victims following disclosure. Journal of Interpersonal Violence, 12, 499-512] "Many sexual abuse victims, even in societies with highly developed child protection and mental health services, do not tell anyone at the time and even if they do, the abuse is rarely reported to authorities. Actions cannot be taken to protect children or the community or get help for children if the abuse is not known to caring adults or the authorities" (emphasis added) "Most sexually abused children are victimized by someone they are related to or someone they know". "Treatment is often complicated by the fact that families are in crisis or have other significant problems that interfere with a focus on the child's abuse reactions (homelessness)[unemployment]" ...it is important that alternative means of accomplishing the central goals of child protection and assistance are identified. The essential ingredients ...some mechanism for protecting the victims and other children in the community from identified offenders... informal ways of giving children support and the opportunity to resolve psychological symptoms. [The paradigm used by legislatures that more excessive methods of sex offender registration will help public safety, is fallacious. Confidential sex offender identification available only to law enforcement is consistent

Utah's intended alternative purpose is found unchanged from the original 1987 version through multiple amendments (*UCA 77-27-21.5,* Section (2)) that have significantly changed methodology and confidentiality. This stated alternative purpose, became more irrationally connected to the new methods with each amendment. "[O]ne can understand the pain and anguish that produced the laws... What one cannot do is allow passion, pain, and anger to cloud reason and judgment." (*Earl-Hubbard, M.L. (1996)*). While it is clear to many commentators that public safety is not rationally connected to the current law, other highly respected psychology professionals in prevention of sexual

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with the scientific proof by Hanson that most identified sex offenders never re-offend. Evidence seems to be strong that the new and workable paradigm to rationally connect public safety with sex offender registration, should be that confidential registration be maintained. Victims and offenders should be encouraged to report sexual abuse and seek therapy as a means to stop cycles of abuse] "Encouraging children to come forward ... is only worthwhile if the benefits of reporting outweigh the costs [or perceived benefits] of remaining silent". "The most important factor in creating a receptive climate for reporting is a societal context that condemns sexual abuse of children and does not take a punitive response toward children"

[20] *Small, J.A. (1999)* pg 1454 "to deal effectively with sex crimes, we must be careful not to make broad generalizations about sex offenders." pg 1455 "Contrary to the popularly held belief that sex crimes are usually committed by sinister strangers, 75% of all sexual assaults are perpetrated by offenders known to the victim". pg 1469 - 1470"Current notification schemes also may be flawed in significant ways that thwart the protective purposes of notification statutes" "Some critics argue that recent sex offender legislation fails to address the underlying problem of sex crimes by focusing only on ex post action (footnote references Greenberg, supra note 15, at 334 noting that underlying problem is not eliminated by use of penal sanctions) and offers communities a false sense of security... Notification about individuals who pose a minimal risk imposes a potentially high cost both on offende:' and on the community... overnotification creates a climate of fear and suspicion that fragments communities (footnote references Bedarf, supra note 118, at 907)

abuse, noted the irrational actions of legislators themselves in their rush to implement the laws. "[P]oliticians are passing laws that cater to the public's fear of sex crimes, and passing legislation based on emotions is not an appropriate avenue." (*Freeman-Longo, R. E. (1997)*). "Megan's Law was the product of politics and passion." (*Ruess, M. (1996)*).

In 1994, Alaska's Legislature based it's original sex offender registration law on irrational logic, fallacy, and emotion, which has forged punishment into law in the instant case, because there is no rational connection between public safety and the onerous methods used by Alaska. Perhaps no one could make this point more clear than Dr. Hanson, the very statistical research scientist that accumulated proof of the first premise announced in this brief, "that Identification of Sex Offenders Substantially Reduces Recidivism Rates of the Sex Offenders Identified".

> "it is worth considering Grove and Meehl's (1996) caution about the use of unverified clinical opinion, which they compare to the Inquisition's methods for identifying witches. 'All policy makers should know that a practitioner who claims not to need any statistical or experimental studies but relies solely on clinical experience as adequate justification, by that very claim is shown to be a nonscientifically minded person whose professional judgments are not to be trusted' (Grove & Meehl, 1996, p 320, [Psychology, Public Policy & Law, 2]). Not too long ago, the people who evaluate sexual offenders had little choice but to use unverified clinical opinion because the relevant research was unavailable. With recent advances, however, knowledgeable evaluators now have the potential of providing risk assessments worthy of serious consideration." (*Hanson, R. K. (2000)*)

Like Alaska, many states have based public disclosure amendments and laws since 1993 on subjective myths that

should now be replaced with scientific evidence in order to restore a rational connection between public safety and the law, and prevent further violations of the Constitution[21].

With this negative impact on public safety being the case for sex offender registration procedures that decrease confidentiality (including public disclosure on the Internet) and/or increase the frequency or period of reporting, we now re-visit the following three *Mendoza-Martinez* factors (*Kennedy v. Mendoza-Martinez (1963)*), (4) Promote traditional aims of punishment-retribution and deterrence. (6) Whether the "good purpose" [alternative purpose] is rationally connected to the consequences. (7) Excessiveness.

A. PROMOTE TRADITIONAL AIMS OF PUNISHMENT, RETRIBUTION AND DETERRENCE.

The empirical evidence presented earlier strongly indicates that victims are deterred from reporting sexual abuse by public disclosure on the Internet. The deterrent affect on victims is as much or more than it is on offenders. With regard to Alaska and Utah's SORAs that currently require Internet disclosure, both courts that dealt with

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[21] The Alaska legislature passed its original sex offender registration law in 1994, containing onerous provisions, including public disclosure on the Internet and repeated reporting to police by registrants. Unlike many states, like Utah, who began with strict confidentiality of the information collected, Alaska's statute was irrationally connected to public safety from the beginning. The Alaska legislature then added amendments that made the onerous procedures applicable to additional crimes. Utah's original legislation was enacted in 1987. It's original requirement that the information collected be confidential and available only to police agencies in the performance of their duties, was clearly rationally connected to public safety. By April 1, 1992 the confidentiality provision had been completely removed. In 1997 information collected was made available by petition. In 1998, a further Utah amendment placed the information collected on the Internet. State Representative, Brian Allen, the sponsor of the legislation, justified this Internet public disclosure was needed to serve a new alternative purpose, to save the state money.

Alaska's statute (*Doe I v. Otte (2001)* 259 F.3d 979 (9th Cir)) (*Rowe, et al. v. Boteiho (1994)*) concluded that traditional aims of punishment and deterrence weigh in the direction of punishment. The 10th Circuit in the Utah case, found that this factor was inconclusive in it's weight for punishment, assuming that the disclosure seems to constitute punishment by creating public disclosure and ostracism (*Femedeer v Haun (2000)*, 227 F.3d 1244 (10th Cir)). The Utah Federal court (*Femedeer (1999)*) said, "retributive effects of the statute could **not be attributable to the government**", and therefore concluded that this test does not weigh in the direction of punishment. The observations of Utah's Federal Judge Kimball and of Alaska's Federal Court in *Rowe*, indicate the same impact of Internet disclosure on victims with their observations that the deterrent effects are displaced from the perpetrator. The Alaska Federal Court said, "The burdens placed directly on the perpetrator by the Registration Act are de minimis in this context… the only meaningful deterrence flowing directly from registration comes from modifying the conduct of the…public".

Both courts that dealt with Alaska's statute have determined that the deterrent factor weighs in the direction of punishment (support Ex Post treatment of Internet disclosure laws), while the courts dealing with Utah's statute had mixed opinions pointing to punishment by ostracism that can impact the public. With this consensus and the implications that such laws negatively impact victims, and are not hewn to promote the aim of public safety, we now move to the factor of connection between alternative purpose and methods.

B. WHETHER THE "GOOD PURPOSE" [ALTERNATIVE PURPOSE] IS RATIONALLY CONNECTED TO THE CONSEQUENCES.

Three of the above named court's treatment of this factor regarding the Alaska and Utah statutes, were cursory,

each court adopting the fallacy that Internet disclosure and other onerous methods must be rationally connected to public safety as long as public safety is a good purpose. Judge Kimball (*Femedeer (1999)*) on the other hand, recognized that a legislature's planned intention may not be the same as the impact of the law, and **combined this factor** of whether there is a rational connection to the alternative purpose, **with the factor of excessiveness** with respect to public safety. Judge Kimball concluded that these factors weigh in the direction of punishment (and support Ex Post treatment).

Empirical evidence presented earlier in this brief strongly indicates that victims are deterred from reporting sexual abuse by public disclosure on the Internet, and the deterrent affect on reporting of sexual abuse makes the onerous methods employed by both Alaska and Utah's current SORAs, irrationally connected to the good government purpose of public safety. Taking this empirical evidence into account, all four of the above named courts would clearly weigh this illogical connection to public safety in the direction of punishment and support Ex Post treatment of Alaska and Utah's current sex offender registration laws.

C. EXCESSIVENESS:

Not only three of the four above named courts determined that Alaska and Utah's current SORAs employ excessive measures that constitute punishment and violate the Ex Post Facto prohibition, but "[w]ith only one exception, every sex offender registration and notification law that has been upheld by a federal court of appeals has tailored the provisions of the statute to the risk posed by the offender " (*Doe I v. Otte (2001)*), and "of the sex offender registration laws that have successfully overcome ex post facto challenges, none [except one case heard after *Kansas v Myers*] have …provided for unlimited public access to the registered sex offender information" (*Kansas v. Myers, 260*

Kan. 669, 923 P.2d 1024, 1041 (1996)). The 10th Circuit Court in its consideration of Utah's current SORA (*Femedeer v Haun (2000)*), is that solitary exception.

From the empirical evidence presented earlier in this brief, that strongly indicates that victims are deterred from reporting sexual abuse by public disclosure on the Internet, the conclusions of the above three courts are firmly grounded, that Alaska and Utah's SORAs are excessive with respect to the purpose of public safety, and that they violate the ex post facto prohibition of the Constitution. The 10th Circuit court's conclusion that "we do not think that Internet notification imposes excessive costs" (*Femedeer v Haun (2000)*), is shown by the empirical evidence to be in error.

In Utah, the very nature of converting the confidentiality requirement, contained in the original 1987 version of the Utah statute, into public disclosure on the internet, is excessive when considered in light of the scientific evidence that doing so diminishes public safety. The 1987 sex offender registration statute was hewn to the public safety purpose, and provided, Section (12), "**information collected** under this section **is confidential** under Chapter 2, Title 63, regarding information practices and is **available to law enforcement agencies only** in the performance of their duties".

The Federal District Court for Utah concluded that placing sex offender registry information on the Internet was excessive, and that "to the extent the statute is to be applied retroactively, **they** [safeguards 'to avoid dissemination of the information beyond the area where it is likely to have the intended remedial effect'] **are constitutionally required**" (*Femedeer (1999)*, quoting *Pataki*, 120 F.3d at 1262). The District Court concluded, "the legislature is not free from the constitutional requirement that the means selected be reasonably related to the statute's nonpunitive purpose of

preventing additional sex offenses, and the Department's intended course of action fails this prerequisite".

Perhaps, nowhere else has a court come so close to summarizing what the scientific facts now show, than Judge Dale Kimball did when he made the above conclusions regarding the *Mendoza-Martinez* factor of Excessiveness. Even without the scientific studies that are respectfully presented in this brief, Judge Kimball articulated the Constitutional requirement that the "means selected be reasonably related to the" alternative purpose of public safety by making the registry information available only to individuals *qualified* in promoting public safety.

CONCLUSION

This brief has respectfully appraised this Court of statistical research that has tested the premise that onerous methods in SORAs, including public disclosure, will aid public safety. The research proves that the premise is false. Public safety is diminished by sex offender registry methods **that exceed** making the information collected available ONLY to law enforcement agencies in the line of their duties.

Three *Mendoza-Martinez* factors have been re-visited in light of the statistical proof. **Deterrence**: Public disclosure and other onerous methods in SORAs deter victims from reporting, as well. **Rational connection to alternative purpose**: Onerous methods are irrational. Victim reporting has been reduced by 30%. Public safety is hurt rather than helped. **Excessiveness**: Most courts agree that the onerous methods are excessive. The statistical proof presented here shows that public safety is hurt by reduced victim reporting. There can no longer be any doubt that Internet disclosure of sex offender information weighs heavily as punishment under the *Mendoza-Martinez* standard. Sex offender registration laws that do not keep registry information confidential, especially laws that make the information available to the

public, including on the Internet, violate the ex post facto prohibition and the Double Jeopardy clause.

Therefore, both Alaska and Utah's SORAs are unconstitutional. Sex offenders convicted under a prior sex offender registration law or amendment that required the information collected to be available only to law enforcement agencies in the line of their duties, are not subject to later amendments to that law. In Utah, this means that sex offenders convicted prior to April 1, 1992, like *amicus curaie* Jones, are subject only to the provisions of the SORA in affect prior to that date.

Further, the broad implications from the scientific proof that such onerous registry disclosure methods actually diminish public safety, lead us to the conclusion that additional Constitutional protections, including Due Process, are violated by public disclosure of sex offender registration information. Internet exposure is more egregious than other methods, but any public disclosure of the information about low risk offenders undermines the fabric that is held together by the various threads of Constitutional rights. In order to affirm public confidence that this Court will not interpret the fabric of Constitutional protections in a manner which sacrifices public safety for punitive and ill conceived government purposes that are irrationally based, we respectfully urge that the United States Supreme Court Declare all statutes that require public disclosure of sex offender registration information on the Internet, to be contrary to the legitimate government purpose of public safety, and that the Court Remand all such statutes back to the various states for implementation of sex offender intervention measures that promote public safety by encouraging victims to report sexual abuse, and perpetrators to identify themselves and seek treatment.

Dated this 31 day of July, 2002.

Appendix

Sex Offense Recidivism